CHAPTER 41

CONTRACT ADMINISTRATION

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I. INTRODUCTION. Following this instruction, the student will understand the key issues facing government attorneys in the administration of government contracts.

II. CONTRACT INTERPRETATION PRINCIPLES.

A. Main Issues.

1. Did the government's interpretation originate from an employee with authority? See J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992).

2. Did the contractor perform work that the contract did not require?

3. Did the contractor timely notify the government of the impact of the government's interpretation?

B. Contract Interpretation Process.

1. A judge must interpret a contract when the parties do not agree on the meaning of its terms. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990).

2. Framework for analyzing contract interpretation issues.

a. Seek the intent of the parties by examining:

(1) The language of the contract; and/or

(2) The facts and circumstances surrounding contract formation and performance.

b. If this process fails to reveal the objective intent of the parties, apply the two rules of risk allocation: contra proferentem and the duty to seek clarification.

3. The contractor must continue performance even if it does not agree with the contracting officer's interpretation, absent a material breach. See FAR 52.233-1, Disputes; Aero Prods. Co., ASBCA No. 44030, 93-2 BCA ¶ 25,868.

C. Intrinsic Evidence of Intent.

1. In determining the objective intent of the parties, first examine the terms of the contract. See, e.g., U.S. Eagle, Inc., ASBCA No. 41093, 92-1 BCA ¶ 24,371.

2. Interpret the contract as a whole. Coast Federal Bank, FSB v. United States, 02-5032, (Ct. App. Fed. Cir. Mar. 24, 2003); M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82 (1993) (courts must give reasonable meaning to all parts of the contract and not render any portions of the contract meaningless); Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972 (Ct. Cl. 1965); Bay Ship & Yacht Co., DOT BCA No. 2913, 96-1 BCA ¶ 28,236 (contract must be read as a whole, giving reasonable meaning to all its terms); Sheladia Constr. Corp., VABCA No. 3313, 91-3 BCA ¶ 24,111 (contractor may not ignore requirement merely because it is not stated in normal section of the specifications). Oakland Constr. Co., ASBCA No. 43986, 93-2 BCA ¶ 25,867 (prime contractor responsible for omission in bid caused by subcontractor's failure to bid on contract requirement because subcontractors only received portion of specification from prime contractor).

a. Give effect to all provisions and do not render meaningless any term of the contract. GPA-I, Ltd. P'ship. v. United States, 46 Fed. Cl. 762 (2000); B.D. Click Co. v. United States, 614 F.2d 748 (Ct. Cl. 1980); Jamsar, Inc. v. United States, 442 F.2d 930 (Ct. Cl. 1971); Rex Sys., Inc., ASBCA No. 45874, 94-1 BCA ¶ 26,370; Elec. Genie, Inc., ASBCA No. 40535, 93-1 BCA ¶ 25,307.

b. Interpret a contract in harmony with its principal purpose. Maddox Indus. Contractors, Inc., ASBCA No. 36091, 88-3 BCA ¶ 21,037; Restatement (Second) of Contracts § 203(a) (1981).

3. Order of precedence.

a. To resolve inconsistencies, order of precedence clauses establish priorities among different sections of the contract. See, e.g., FAR 52.214-29, Order of Precedence-Sealed Bidding; FAR 52.215-8, Order of Precedence – Uniform Contract Format; FAR 52.236-21, Specifications and Drawings for Construction.

b. In construction contracts, a contractor may rely on the order of precedence clause to resolve a discrepancy between the specifications and drawings even if a discrepancy is patent or known to the contractor prior to bid submission. Hensel Phelps Constr. Co. v. United States, 886 F.2d 1296 (Fed. Cir. 1989); C Constr. Co., ASBCA No. 38098, 91-2 BCA ¶ 23,923; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173. See also Shah Constr. Co. Inc., ASBCA No. 50411, 01-1 BCA ¶ 31,330.

c. Omissions. In construction contracts, the DFARS states that the contractor shall perform omitted details of work that are necessary to carry out the intent of the drawings and specifications or that are performed customarily. DFARS 252.236-7001; M.A. Mortenson Co., ASBCA No. 50383, 00-2 BCA ¶ 30,936 (holding that contractor should have known elevator would require rail support columns despite their omission from drawings); Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173.

d. If the order of precedence clauses do not resolve the inconsistency, the common law rule is that a specific term takes precedence over a general term. Restatement (Second) of Contracts, § 203 (1981).

D. Extrinsic Evidence of Intent.

1. Do not consider extrinsic evidence if the contract terms are clear. See Coast Federal Bank, FSB v. United States, 02-5032, (Ct. App. Fed. Cir. Mar. 24, 2003); C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); D&L Constr. Co., AGBCA No. 97-205-1, 00-1 BCA ¶ 31,001; Skyline Technical Constr. Servs., ASBCA No. 51076, 98-2 BCA ¶ 29,888 (since contract was clear, no extrinsic evidence allowed).

2. Preaward communications.

   a. The Explanation to Prospective Offerors clause does not prevent parties from using clarifying statements by "authorized" officials to interpret an ambiguous provision. FAR 52.214-6 (sealed bidding); Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970); Turner Constr. Co. v. Gen. Servs. Admin., GSBCA No. 11361, 92-3 BCA ¶ 25,115 (contractor could not rely on preaward statement that was inconsistent with terms of solicitation); Community Heating & Plumbing Co., ASBCA No. 37981, 92-2 BCA ¶ 24,870.

   b. Statements made at pre-bid conferences may bind the government. Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560; Gen. Atronics Corp., ASBCA No. 46784, 94-3 BCA ¶ 27,112. Cf. Orbas & Assoc., ASBCA No. 33359, 87-2 BCA ¶ 19,742 (contractor who did not attend pre-bid conference was not bound by explanation of provision where solicitation should have explained provision).

   c. Preaward acceptance of contractor's cost-cutting suggestion was binding on the government. See Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395.

3. Actions during contract performance. The way in which the parties comport themselves often reveals the intent of the parties. Courts and boards afford these actions great weight when determining the meaning of a provision. Drytech, Inc., ASBCA No. 41152, 92-2 BCA ¶ 24,809; Macke Co. v. United States, 467 F.2d 1323 (Ct. Cl. 1972).

4. Prior course of dealing.

a. To determine the meaning of the current contract, consider a prior course of dealing between the parties in earlier contracts. Superstaff, Inc., ASBCA No. 46112, 94-1 BCA ¶ 26,574; American Transp. Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).

b. The parties must be aware of the prior course of dealing. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972); T. L. Roof & Assocs., ASBCA No. 38928; 93-2 BCA ¶ 25,895; Snowbird Indus., ASBCA No. 33027, 89-3 BCA ¶ 22,065.

c. Prior waivers of specifications must be numerous or consistent to vary an unambiguous term. Doyle Shirt Mfg. Corp., 462 F.2d 1150 (Ct. Cl. 1972); Cape Romain Contractors, Inc., ASBCA Nos. 50557, 52282, 00-1 BCA ¶ 30,697 (one waiver does not establish a course of dealing); Kvaas Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (four waivers not enough); Gen. Sec. Servs. Corp. v. Gen. Servs. Admin., GSBCA No. 11381, 92-2 BCA ¶ 24,897 (no waiver based on waivers in six previous contracts because GSA sought to enforce requirement in current contract).

5. Custom or trade usage/industry standard.

a. Parties may not use custom and trade usage to contradict unambiguous terms. WRB Corp. v. United States, 183 Ct. Cl. 409, 436 (1968); C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); All Star / SAB Pacific, J.V., ASBCA No. 50856, 99-1 BCA ¶ 30,214; Riley Stoker Corp., ASBCA No. 37019, 92-3 BCA ¶ 25,143 (contract terms were ambiguous); Harold Bailey Painting Co., ASBCA No. 27064, 87-1 BCA ¶ 19,601 (used to define "spot painting").

b. Parties may resort to custom and trade usage to explain or define unambiguous terms. W.G. Cornell Co. v. United States, 376 F.2d 299 (Ct. Cl. 1967).

c. Parties also may use an industry standard or trade usage to show that a term is ambiguous. See Metric Constr., Inc. v. Nat'l Aeronautics and Space Admin., 169 F.3d 747 (Fed. Cir. 1999) (contractor reasonably relied on trade practice and custom to show that the specifications were susceptible to different interpretations); Gholson, Byars, & Holmes Constr. Co. v. United States, 351 F.2d 987 (Ct. Cl. 1965); Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).

E. Allocation of Risk for Ambiguous Language. If a contract is susceptible to more than one reasonable interpretation after application of the aforementioned rules, it contains an ambiguity. GPA-I, Ltd. P'ship. v. United States, 46 Fed. Cl. 762 (2000); Metric Constr., Inc. v. Nat'l Aeronautics and Space Admin., 169 F.3d 747 (Fed. Cir. 1999). It is then necessary to apply risk allocation principles to determine which party is ultimately responsible. The risk allocation principles do not apply to ambiguities in procurement regulations. Santa Fe Eng'rs, Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986).

1. Contra proferentem. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390 (1947).

a. If one cannot resolve an ambiguity under the contract interpretation rules, construe the ambiguity against the drafter. Emerald Maint., Inc., ASBCA No. 33153, 87-2 BCA ¶ 19,907; WPC Enter. v. United States, 323 F.2d 874 (Ct. Cl. 1963).

b. "[Contra proferentem] puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves contractors from hidden traps not of their own making." Sturm v. United States, 421 F.2d 723 (Ct. Cl. 1970).

c. Elements of the rule.

(1) To recover, the contractor's interpretation must be reasonable. Teague Bros. Transfer & Storage Co., Inc., ENG BCA Nos. 6312, 6313, 98-1 BCA ¶ 29,333 (the board decided that the contractor's interpretation of the latent ambiguity was reasonable); J.C.N. Constr. Co., ASBCA No. 42263, 91-3 BCA ¶ 24,095 (contractor interpretation unreasonable);

(2) The opposing party must be the drafter. This is usually the government, but a contractor may also be the drafter. See Canadian Commercial Corp. v. United States, 202 Ct. Cl. 65 (1973); TRW, Inc., ASBCA No. 27299, 87-3 BCA ¶ 19,964; Prince George Ctr., Inc. v. Gen. Servs. Admin., GSBCA No. 12289, 94-2 BCA ¶ 26,889; and

(3) The non-drafting party must have detrimentally relied on its interpretation in submitting its bid. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990); National Med. Staffing, Inc., ASBCA No. 45046, 96-2 BCA ¶ 28,483 (for contra proferentem to apply, the contractor must demonstrate that it relied upon the interpretation in submitting its bid, not merely that it relied during performance); Food Servs., Inc., ASBCA No. 46176, 95-2 BCA ¶ 27,892.

2. Duty to seek clarification.

a. Do not apply contra proferentem if an ambiguity is patent and the contractor failed to seek clarification. See Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997) (holding that contractor should have recognized the patent ambiguity and sought clarification before submitting its bid).

b. An ambiguity is patent if it would have been apparent to a reasonable person in the claimant's position or if the provisions conflict on their face. See White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a note disclaiming the government's warranty on one of several dozen design drawings was patent); Hensel Phelps Constr. Co., ASBCA No. 49716, 00-2 BCA ¶ 30,925 (holding that an objective standard applied to the latent/patent ambiguity determination); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; Gaston & Assocs., Inc. v. United States, 27 Fed. Cl. 243 (1993) (latent ambiguity); Foothill Eng'g., IBCA No. 3119-A, 94-2 BCA ¶ 26,732 (the misplacement of a comma in a figure was a latent ambiguity and did not trigger a duty to inquire, because it was not obvious and apparent in the context of a reasonable, but busy, bidder). See also Pascal & Ludwig Eng'r, ENG BCA No. 6377, 99-1 BCA ¶ 30,135 (indicating that the ratio of the dollar amount at issue due to the ambiguity versus the contract price is a persuasive factor in determining whether the ambiguity is patent).

III. CONTRACT CHANGES.

A. Types of Formal Changes.

1. Administrative change. A unilateral written change that does not affect the substantive rights of the parties. FAR 43.101. Example: a change in paying office or a change in telephone number for an agency point of contact.

2. Change order. A unilateral, written order, signed by the contracting officer, directing the contractor to make a change that a Changes clause authorizes, with or without the contractor's consent. FAR 43.101.

3. Bilateral modification (supplemental agreement). A contract modification signed by the contractor and the contracting officer. FAR 43.103(a). Bilateral modifications are used for:

a. Negotiating equitable adjustments that result from the issuance of a change order;

b. Definitizing a letter contract; and

c. Reflecting other agreements of the parties affecting the terms of a contract.

B. Modifying a Contract.

1. Only contracting officers acting within the scope of their authority may execute contract modifications. FAR 43.102; Hensel Phelps Constr. Co., GSBCA Nos. 14744, 14877, 01-1 BCA ¶ 31,249; Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; Commercial Contractors, Inc., ASBCA No. 30675, 88-3 BCA ¶ 20,877.

2. Contracting officers should issue modifications on SF 30, Amendment of Solicitation/Modification of Contract. FAR 43.102; FAR 43.301; Staff, Inc., AGBCA Nos. 96-112-1, 96-159-1, 97-2 BCA ¶ 29,285 (oral modifications are unenforceable); Texas Instr., Inc. v. United States, 922 F.2d 810 (Fed. Cir. 1990); Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; but see Robinson Contracting Co. v. United States, 16 Cl. Ct. 676 (1989) (SF 30 **not** required). A copy of an SF30 is provided at Appendix D.

3. The contracting officer must price modifications before executing them if this can be done without adversely affecting the interests of the government. If the price cannot be negotiated prior to execution, negotiate a maximum price. FAR 43.102(b).

4. The contracting officer may order a change at any time prior to final payment. Final payment means payment in the full amount of the contract balance owed, received, and accepted by the contractor after delivery of supplies or the performance of services, with the understanding that no further payments are due. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984).

C. Prerequisites for Formal Changes.

1. The government must receive a benefit. G. Issaias & Co. (Kenya), ASBCA No. 30359, 88-1 BCA ¶ 20,441.

2. Proper funds must be available. FAR 43.105; DOD 7000.14-R, vol. 3, ch. 8, para. 080304.C–E; DFAS-IN Reg. 37-1, tbl. 8-7; AFI 65-601, vol. I, para. 6.3.7 and Figure 6.1.

IV. CHANGES CLAUSE COVERAGE.

A. Limitations.

1. The change must be of a type specified in the Changes clause.

2. The change must be within the general scope of the contract.

B. Scope Determinations.

1. In a protest action, the test used by the GAO and the COFC is whether the change so materially altered the contract that the field of competition for the contract as modified would be significantly different from that obtained for the original contract (scope of competition). AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) (holding a modification falls within the scope of the original procurement if potential offerors would have reasonably anticipated such prior to initial award); Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90 (2000); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11; L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18; Hughes Space and Communications, Co., B276040, 97-1 CPD ¶ 158.

2. In Hughes Space and Communications, Co., B-276040, 97-1 CPD ¶ 158, the following factors were considered in determining whether the modification was in-scope:

a. The extent of any changes in the type of work or the performance period, or the difference in costs between the contract as awarded and as modified;

b. Whether the agency had historically procured the services under a separate contract; and

c. Whether potential offerors would have anticipated the modification.

3. In a contract dispute, the test used by courts and boards is whether the contract, as modified, "should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." Freund v. United States, 260 U.S. 60 (1922); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358; Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.

C. Scope Determination Factors.

1. Changes in the Function of the Item or the Type of Work.

a. In determining the materiality of a change, the most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract. See E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (change from lease to lease/purchase was out-of-scope); Matter of: Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping outside scope of an IDIQ contract for preventive maintenance); Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CPD ¶ 158; Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964).

b. Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (more latitude allowed where the activity requires a state-of-the-art product); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11 (provision of technologically advanced, ruggedized, handheld computers was not beyond the scope of the original contract that called for a wide array of hardware and software and RFP indicated the Engineering Change Proposal process would be utilized to implement technological advances); Paragon Sys., Inc., B-284694.2, 2000 CPD ¶ 114 (contract awarded for broad range of services given wide latitude when issuing a task order); Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).

c. An agency's preaward statements that certain work was outside the scope of the contract can bind the agency if it later attempts to modify the contract to include the work. Octel Communications Corp. v. Gen. Servs. Admin., GSBCA No. 12975-P, 95-1 BCA ¶ 27,315.

D. The Duty to Continue Performance.

1. The Changes and Disputes (Standard) clauses require the contractor to continue performance pending the resolution of a dispute over an **in-scope change**. See FAR 52.233-1, Disputes; FAR 52.243-1(e), Changes-Fixed Price; see also FAR 33.213.

2. Conversely, under the standard Disputes clause, a contractor has no duty to proceed diligently with performance pending resolution of any dispute concerning a change **outside the scope** of the contract (cardinal change). FAR 52.233-1(h). Alliant Techsys., Inc. v United States, 178 F.3d 1260 (Fed. Cir. 1999); CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; Airprep Tech., Inc. v. United States, 30 Fed. Cl. 488 (1994).

3. Exceptions to the duty to proceed.

a. The government withholds progress payments improperly. Sterling Millwrights v. United States, 26 Cl. Ct. 49 (1992). But see D.W. Sandau Dredging, ENG BCA No. 5812, 96-1 BCA ¶ 28,064 (holding two late payments of 12 days and 19 days did not discharge the contractor from its duty to continue performance where contractor did not demonstrate the late payments had impacted its ability to perform).

b. Continued performance is impractical. United States v. Spearin, 248 U.S. 132 (1918) (government refused to provide safe working conditions); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125.

c. The government fails to provide clear direction to the contractor. James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645 (contractor justified to await clarification of defective specifications). Cf. Starghill Alternative Energy Corp., ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 (a one-month Government delay in executing modification did not excuse contractor from proceeding).

4. The Alternate Disputes clause requires the contractor to continue to perform even if the government orders a cardinal change, or otherwise breaches the contract. See FAR 52.233-1, Alternate I. See also DFARS 233.215 (mandating use of this alternate clause under certain circumstances).

V. OVERVIEW OF CONSTRUCTIVE CHANGES.

A. Elements of a Constructive Change. The Sherman R. Smoot Corp., ASBCA Nos. 52173, 53049, 01-1 BCA ¶ 31,252; Green's Multi-Services, Inc., EBCA No. C-9611207, 97-1 BCA ¶ 28,649; Dan G. Trawick III, ASBCA No. 36260, 90-3 BCA ¶ 23,222.

1. A change occurred either as the result of government action or inaction. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546;

2. The contractor did not perform voluntarily. Jowett, Inc., ASBCA No. 47364, 94-3 BCA ¶ 27,110; and

3. The change resulted in an increase (or a decrease) in the cost or the time of performance. Advanced Mech. Servs., Inc., ASBCA No. 38832, 94-3 BCA ¶ 26,964.

B. Types of Constructive Changes:

1. Contract misinterpretation by the government;

2. Defective specifications;

3. Interference and failure to cooperate;

4. Failure to disclose vital information (superior knowledge); and

5. Constructive acceleration.

VI. DEFECTIVE SPECIFICATIONS - OVERVIEW.

A. Theories of Recovery. Courts and boards hold the government liable for defects in specifications based upon:

1. The implied warranty the government gives for the use of design specifications in a contract.

2. The principles of impracticability/impossibility of performance when the contractor incurs increased costs while attempting to conform to defective performance specifications.

B. Causation. This type of constructive change is deemed to have occurred at the time of contract award on the premise that the contracting officer had an immediate duty to issue an order correcting the defective specifications.

C. Basis for the Implied Warranty of Specifications.

1. This "warranty" is based on an implied promise by the government that a contractor can follow the contract drawings and specifications and perform without undue expense. This promise has been called a warranty; however, recovery is based on a breach of the duty to provide drawings and specifications reasonably free from defects. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Fru-Con Constr. Corp. v. United States, 42 Fed. Cl. 94 (1998); United States v. Spearin, 248 U.S. 132 (1918); Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966).

2. Defective specifications constitute constructive changes. See, e.g., Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1964). In some cases, judges have relied on a breach of contract theory. See, e.g., Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276 (1992).

D. Specification Types. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

1. **DESIGN SPECIFICATIONS** set forth precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Q.R. Sys. North, Inc., ASBCA No. 39618, 92-2 BCA ¶ 24,793 (specified roofing material inadequate for roof type).

2. **PERFORMANCE SPECIFICATIONS** set forth the operational characteristics desired for the item. In such specifications, design, measurements, and other specific details are neither stated nor considered important as long as the performance requirement is met. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).

3. **PURCHASE DESCRIPTIONS** are specifications that designate a particular manufacturer's model, part number, or product. The phrase "or equal" may accompany a purchase description. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270.

4. **COMPOSITE SPECIFICATIONS** are specifications that are comprised of two or more different specification types. See Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991; Transtechnology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

E. Scope of Government Liability.

1. The scope of government liability depends on the specification type. Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988); Morrison-Knudsen Co., ASBCA No. 32476, 90-3 BCA ¶ 23,208.

2. Design specifications.

a. The key issue is whether the government required the contractor to use detailed specifications. Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359. Nonconformity with design specifications result in reduction in contract price. Donat Gerg haustechnick, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272.

b. The government is responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Neal & Co. v. United States, 19 Cl. Ct. 463 (1990) (defective design specifications found to cause bowing in wall); International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994 (bland chicken ala king). But see Hawaiian Bitumuls & Paving v. United States, 26 Cl. Ct. 1234 (1992) (contractor may vitiate warranty by participating in drafting and developing specifications).

3. Performance specifications.

a. If the government uses a performance specification, the contractor accepts general responsibility for the design, engineering, and achievement of the performance requirements. Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Blake Constr. Co. v. United States, 987 F.2d 743 (Fed. Cir. 1993); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.

b. The contractor has discretion as to the details of the work, but the work is subject to the government's right of final inspection and approval or rejection. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546.

4. Purchase descriptions. Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

a. If the contractor furnishes or uses in fabrication a specified brand name or an acceptable and approved substitute brand-name product, the responsibility for proper performance generally falls upon the government.

b. The government's liability is conditioned upon the contractor's correct use of the product.

c. If the contractor elects to manufacture an equal product, it must ensure that the product is equal to the brand name product.

5. Composite specifications.

a. If the government uses a composite specification, the parties must examine each portion of the specification to determine which specification type caused the problem. This determination establishes the scope of the government's liability. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Penguin Indus. v. United States, 530 F.2d 934 (Ct. Cl. 1976). Cf. Hardwick Bros. Co., v. United States, 36 Fed. Cl. 347 (Fed. Cl. 1996) (since mixed specifications were primarily performance-based, there is no warranty covering the specifications).

b. The contractor must isolate the defective element of the design portion or demonstrate affirmatively that its performance did not cause the problem. Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991 (finding that contractor failed to demonstrate deficient fuses were due to deficient Government design rather than production problems).

F. Recovery under the Implied Warranty of Specifications. See Transtechnology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

1. To recover under the implied warranty of specifications, the contractor must prove that:

a. It reasonably relied upon the defective specifications and complied fully with them. Phoenix Control Sys., Inc. v. Babbitt, Secy. of the Interior, 1997 U.S. App. LEXIS 8085 (Fed. Cir. 1997); Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988); Gulf & Western Precision Eng'g Co. v. United States, 543 F.2d 125 (Ct. Cl. 1976); Mega Constr. Co., 29 Fed. Cl. 396 (1993); Bart Assocs., Inc., EBCA No. C-9211144, 96-2 BCA ¶ 28,479; and

b. That the defective specifications caused increased costs. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395 (contractor failed to demonstrate that defective specification caused its delay); Chaparral Indus., Inc., ASBCA No. 34396, 91-2 BCA ¶ 23,813, aff'd, 975 F.2d 870 (Fed. Cir. 1992).

2. The contractor cannot recover if it has actual or constructive knowledge of the defects prior to award. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Centennial Contractors, Inc., ASBCA No. 46820, 94-1 BCA ¶ 26,511; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969) (contractor had actual knowledge from prior contract). Generally, constructive knowledge is limited to patent errors because a contractor has no duty to conduct an independent investigation to determine whether the specifications are adequate. Jordan & Nobles Constr. Co., GSBCA No. 8349, 91-1 BCA ¶ 23,659; John C. Grimberg Co., ASBCA No. 32490, 88-1 BCA ¶ 20,346. Cf. Spiros Vasilatos Painting, ASBCA No. 35065, 88-2 BCA ¶ 20,558.

3. A contractor may not recover if it decides unilaterally to perform work knowing that the specifications were defective. Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979).

4. A contractor may not recover if it fails to give timely notice that it was experiencing problems without assistance of the government. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; JGB Enters., Inc., ASBCA No. 49493, 96-2 BCA ¶ 28,498.

5. The government may disclaim this warranty. See, e.g., Serv. Eng'g Co., ASBCA No. 40272, 92-3 BCA ¶ 25,106; Bethlehem Steel Corp., ASBCA No. 13341, 72-1 BCA ¶ 9186. The disclaimer must be obvious and unequivocal, however, in order to shift the risk to the contractor. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a small note disclaiming the government's warranty found on one of several dozen design drawings was hidden and not obvious).

VII. INTERFERENCE AND FAILURE TO COOPERATE.

A. Theory of Recovery.

1. Contracting activities have an implied obligation to cooperate with their contractors and not to administer the contract in a manner that hinders, delays, or increases the cost of performance. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001) (holding that the Forest Service beached a timber sale contract by suspending the contractor's logging operations when the Mexican spotted owl was listed as an endangered species instead of consulting with the Fish and Wildlife Service and developing a management plan as was required by the ESA); Coastal Gov't Serv., Inc., ASBCA No. 50283, 01-1 BCA ¶ 31,353; R&B Bewachungsgesell-schaft GmbH, ASBCA No. 42213, 91-3 BCA ¶ 24,310; C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296. See also Restatement (Second) of Contracts, § 205 (1981).

2. Generally a contractor may not recover for "interference" that results from a sovereign act. See Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, rev'd sub nom., Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995) (holding that a criminal investigation of the contractor was a noncompensable sovereign act); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (limitation on dredging period created implied warranty); R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310 (criminal investigators took action in government's contractual capacity, not sovereign capacity). See also Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) (holding that the government may waive sovereign act defense); Oman-Fischbach Int'l, a Joint Venture, ASBCA No. 44195, 00-2 BCA ¶ 31,022 (actions of a separate sovereign were not compensable constructive changes).

B. Bases for Interference Claims.

1. Overzealous inspection of the contractor's work. Neal & Co., Inc. v. United States, 36 Fed. Cl. 600 (1996) ("nit-picking punch list" held to be overzealous inspection); WRB Corp. v. United States, 183 Ct. Cl. 409 (1968); Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).

2. Incompetence of government personnel. Harvey C. Jones, Inc., IBCA No. 2070, 90-2 BCA ¶ 22,762.

3. Water seepage or flow caused by the government. See C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296 (water from malfunctioning sump pump was interference); Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639 (government's failure to remove snow piles which resulted in water seepage constituted a breach of its implied duty not to impede the contractor's performance).

4. Disruptive criminal investigations conducted in the government's contractual capacity. R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310.

C. Bases for Failure to Cooperate Claims. The government must cooperate with a contractor. See, e.g., Whittaker Elecs. Sys. v. Dalton, Secy. of the Navy, 124 F.3d 1443 (Fed. Cir. 1997); James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835; Mit-Con, Inc., ASBCA No. 42916, 92-1 CPD ¶ 24,539. Bases for claims include:

1. Failure to provide assistance necessary for efficient contractor performance. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972) (implied requirement); Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145 (failure to contest sheriff's stop work order was not failure to cooperate); Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466; Packard Constr. Corp., ASBCA No. 46082, 94-1 BCA ¶ 26,577; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 76-1 BCA ¶ 11,851 (express requirement).

2. Failure to prevent interference by another contractor. Examine closely the good faith effort of the government to administer the other contract to reduce interference. Northrup Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Stephenson Assocs., Inc., GSBCA No. 6573, 86-3 BCA ¶ 19,071.

3. Failure to provide access to the work site. Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (absent specific warranty, site unavailability must be due to government's fault); Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968; R.W. Jones, IBCA No. 3656-96, 99-1 BCA ¶ 30,268; Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173, *recons. denied*, 92-1 BCA ¶ 24,374 (failure to grant security clearances); M.A. Santander Constr., Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 (interference excused default); Reliance Enter., ASBCA No. 20808, 76-1 BCA ¶ 11,831.

4. Abuse of discretion in the approval process. When the contract makes the precise manner of performance subject to approval by the contracting officer, the duty of cooperation requires that the government approve the contractor's methods unless approval is detrimental to the government's interest. Ralph C. Nash, Jr., Government Contract Changes 12-7 (2d ed. 1989). Common bases for claims are:

   a. Failure to approve substitute items or components that are equal in quality and performance to the contract requirements. Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060; Bruce-Anderson Co., ASBCA No. 29411, 88-3 BCA ¶ 21,135 (contracting officer gave no explanation for refusal).

   b. Unjustified disapproval of shop drawings or failure to approve within a reasonable time. Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963).

   c. Improper failure to approve the substitution or use of a particular subcontractor. Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852, *recon. denied*, 00-2 BCA ¶ 30,930; Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991); Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982); Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Richerson Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11161, 93-1 BCA ¶ 25,239. Cf. FAR 52.236-5, Material and Workmanship.

VIII. CONSTRUCTIVE ACCELERATION.

A. Theory of Recovery.

1. If a contractor encounters an excusable delay, it is entitled to an extension of the contract schedule.

2. Constructive acceleration occurs when the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period.

B. Elements of Constructive Acceleration. Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306 (1999); Atlantic Dry Dock Corp., ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; Trepte Constr. Co., ASBCA No. 28555, 90-1 BCA ¶ 22,595.

1. The existence of one or more excusable delays;

2. Notice by the contractor to the government of such delay and a request for an extension of time;

3. Failure or refusal by the government to grant the extension request;

4. An express or implied order by the government to accelerate; and

5. Actual acceleration resulting in increased costs.

C. Actions That May Lead to Constructive Acceleration.

1. The government threatens to terminate when the contractor encounters an excusable delay. Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058;

2. The government threatens to assess liquidated damages and refuses to grant a time extension. Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981); Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; or

3. The government delays approval of a request for a time extension. Fishbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300, aff'd, 617 F.2d 223 (Ct. Cl. 1980). But see Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078 (mere denial of delay request due to lack of information not tantamount to government order to accelerate).

D. Measure of Damages.

1. The contractor's acceleration efforts need not be successful; a reasonable attempt to meet a completion date is sufficient. Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; Fermont Div., Dynamics Corp., ASBCA No. 15806, 75-1 BCA ¶ 11,139.

2. The measure of recovery will be the difference between:

   a. The reasonable costs attributable to acceleration or attempting to accelerate; and

   b. The lesser costs the contractor reasonably would have incurred absent its acceleration efforts; plus

   c. A reasonable profit on the above-described difference.

3. Common acceleration costs.

   a. Increased labor costs;

   b. Increased material cost due to expedited delivery; and

   c. Loss of efficiency or productivity. A method to compute this cost is to compare the work accomplished per labor hour or dollar during an acceleration period with the work accomplished per labor hour or dollar during a normal period. See Ralph C. Nash, Jr., Government Contract Changes, 18-16 and 18-17 (2d ed. 1989).

E. Notice of a Change by the Contractor.

1. Formal changes. The standard Changes clauses each state that "the Contractor must assert its right to an adjustment . . . within 30 days after receipt of a written [change] order." Courts and boards, however, do not strictly construe this requirement unless the untimely notice is prejudicial to the government. Watson, Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499; SOSA Y Barbera Constrs., S.A., ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754; E.W. Jerdon, Inc., ASBCA No. 32957, 88-2 BCA ¶ 20,729.

2. Constructive Changes.

a. Supply / Service Contracts. The standard supply and service contract Changes clauses do not prescribe specific periods within which a contractor must seek an adjustment for a constructive change.

b. Construction Contracts. Under the Changes clause for construction contracts, a contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a constructive change. FAR 52.243-4(b) and (e). Furthermore, unless the contractor bases its adjustment on defective specifications, it may not recover costs incurred more than 20 days before notifying the government of a constructive change. FAR 52.243-4(d). But see Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257 (1986) (government must show late notice was prejudicial).

c. Content of notice for constructive changes. A contractor must assert a positive, present intent to seek recovery as a matter of legal right. Written notice is not required, and there is no formal method for asserting an intent to recover. The notice, however, must be more than an ambiguous letter that evidences a differing opinion. Likewise, merely advising the contracting officer of problems is not sufficient notice. CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; McLamb Upholstery, Inc., ASBCA No. 42112, 91-3 BCA ¶ 24,081.

F. Request for an Equitable Adjustment.

1. Distinction Between Intent to Submit Adjustment and the Request for Adjustment. The actual request for an adjustment to the contract price or other delivery terms can be submitted at a later time. The above requirement for the contractor to assert its rights to an adjustment places the government on notice that there has been an actual or constructive change to the contract, thus permitting the government to possibly adjust its action/inaction.

2. Effect of Final Payment.

a. Requests for equitable adjustments raised for the first time after final payment are untimely. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989) (final payment rule predicated on express contractual provisions); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.

b. Final payment does not bar claims for equitable adjustments that were pending or of which the government had constructive knowledge at the time of final payment. Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; David Grimaldi Co., ASBCA No. 36043, 89-1 BCA ¶ 21,341 (contractor must specifically assert a claim as a matter of right; letter merely presented arguments).

IX. ANALYZING CHANGES ISSUES.

A. Determine whether the contract required work that differed from what was called for in the original contract. If not, then there was no "change" to the contract requirements, and a contract adjustment is unnecessary.

B. If the government changed the contract requirements, determine whether the new work was within or outside the scope of the contract.

1. Within-scope change. The contractor may be entitled to relief pursuant to the Changes clause. FAR 52.243-1 (supplies); FAR 52.243-1, Alternate I (services); FAR 52.243-4 (construction). Under the basic equitable adjustment formula, the contractor is entitled to the difference between the reasonable costs of performing the work as changed and the reasonable costs of performing as originally required. See Chapter 21.

2. Outside-the-scope change (cardinal change). The contractor's entitlement is measured under common law principles. In general, compensatory damages including a reliance component (costs incurred as a consequence of the breach) and an expectancy component (lost profits) are awarded, but consequential damages are not.

C. If a change occurred, determine whether the government employee who ordered/caused the change had actual authority to order the change or whether the contractor can overcome the employee's lack of actual authority.

D. If a change occurred, determine when the change occurred; when the contractor provided, or when the government can be charged with having acquired, notice of the change; and whether the contractor provided timely notice. Determine if untimely notice prejudiced the government.

E. If a change occurred, determine the effect of the change on the costs incurred or saved by the contractor and on the time required for contract performance.

X. SPECIAL ISSUES IN CONSTRUCTION CONTRACTING

A. Differing Site Conditions (DSC). FAR 52.236-2.

1. This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition.

2. There are two types of differing site conditions. See Consolidated Constr., Inc., GSBCA No. 8871, 88-2 BCA ¶ 20,811.

a. Type I Differing Site Conditions. To recover for a Type I condition, the contractor must prove that:

(1). The contract either implicitly or explicitly indicated a particular site condition. See Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., Inc., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; cf. Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767.

(2). The contractor reasonably interpreted and relied on the contract indications. See R.D. Brown Contractors, Inc., ASBCA No. 43973, 93-1 BCA ¶ 25,368.

(3). The contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract. See Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639.

(4). The claimed costs were attributable solely to the differing site condition. See P.J. Dick, Inc., GSBCA No. 12036, 94-3 BCA ¶ 27,073.

b. Type II Differing Site Conditions. To recover for a Type II condition, the contractor must prove that:

(1). The conditions encountered were unusual physical conditions that were unknown at the time of contract award. See Walser v. United States, 23 Cl. Ct. 591 (1991); Gulf Coast Trailing Co., ENG BCA No. 5795, 94-2 BCA ¶ 26,921; Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472.

(2). The conditions differed materially from those ordinarily encountered. See Green Constr. Co., ASBCA No. 46157, 94-1 BCA ¶ 26,572; Virginia Beach Air Conditioning Corp., ASBCA No. 42538, 92-1 BCA ¶ 24,432; Arctic Slope, Alaska Gen./SKW Eskimos, Inc., ENG BCA No. 5023, 90-2 BCA ¶ 22,850.

3. The DSC clause only covers conditions existing at the time of contract award. Acts of nature occurring after contract award are not differing site conditions. See Arundel Corp. v. United States, 96 Ct. Cl. 77, 354 F.2d 252 (1942); Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; PK Contractors, Inc., ENG BCA No. 4901, 92-1 BCA ¶ 24,583. But see Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.

4. The contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation. See O.K. Johnson Elec. Co., VABCA No. 3464, 94-1 BCA ¶ 26,505; cf. Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516; Indelsea, S.A., ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633; Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653; Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190; Sagebrush Consultants, 01-1 BCA ¶ 31,159 (IBCA), and American Constr., 01-1 BCA ¶ 31,202.

5. The contractor must prove its damages. See H.V. Allen Co., ASBCA No. 40645, 91-1 BCA ¶ 23,393; see also Praught Constr. Corp., ASBCA No. 39670, 93-2 BCA ¶ 25,896.

6. The contractor must promptly notify the government. See Engineering Tech. Consultants, S.A., ASBCA No. 43376, 92-3 BCA ¶ 25,100.

   a. Untimely notification may bar a differing site condition claim if the late notice prejudices the government. See Moon Constr. Co. v. General Servs. Admin., GSBCA No. 11766, 93-3 BCA ¶ 26,017; see also Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491; Meisel Rohrbau, ASBCA No. 35566, 92-1 BCA ¶ 24,434; Holloway Constr., Holloway Sand & Gravel Co., ENG BCA No. 4805, 89-2 BCA ¶ 21,713.

   b. If the government's defense to a differing site condition claim is made more difficult—but not impossible—by the late notice, courts and boards will normally waive the notice requirement and place a heavier burden of persuasion on the contractor. See Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179.

   c. When the government is on notice of differing site conditions, but takes no exception to the contractor's notice or its corrective actions, the government must pay the contractor's increased costs. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.

d. Lack of notice of a differing site condition will not bar a contractor's recovery when the government breaches its duty to cooperate by failing to designate an inspector to whom the contractor may give notice during scheduled weekend work. See Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466.

8. No DSC claim if the contract does not contain the DSC clause. See Marine Industries Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (board rejected a Type II DSC claims solely on the basis that there was no DSC clause in the contract. Without the DSC clause, the contractor bears complete risk for any differing conditions encountered).

B. Use/Possession Prior to Completion. FAR 52.236-11.

1. The government may take possession of a construction project prior to its completion (beneficial occupancy).

2. Possession does not necessarily constitute acceptance. See Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646. The contractor must complete a project as required by the contract, including all "punch list" items. See Toombs & Co., ASBCA No. 34590, 91-1 BCA ¶ 23,403.

3. The contractor is not responsible for any loss or damage that the government causes. See Fraser Eng'g Co., supra.

4. The contractor may be due an equitable adjustment if possession by the government causes a delay.

XI. FUNDAMENTAL CONCEPTS OF INSPECTION AND TESTING.

A. General.

1. The inspection clauses, which are remedy granting clauses, vest the government with significant rights and remedies. FAR 52.246-2 - 52.246-12.

2. In any dispute, the parties must identify the correct theory of recovery and applicable contractual provisions. The theory of recovery normally flows from a contractual provision. See Morton-Thiokol, Inc., ASBCA No. 32629, 90-3 BCA ¶ 23,207 (government denial of cost reimbursement rejected-board noted government's failure to cite Inspection clause).

B. Origin of the Government's Right to Inspect. FAR Part 46.

1. The government has the right to inspect to ensure that it receives conforming goods and services. The particular inspection clauses contained in a contract, if any, determine the government's right to inspect a contractor's performance.

2. Contract inspections fall into three general categories, depending on the extent of quality assurance needed by the government for the acquisition involved. These include:

   a. Government reliance on inspection by the contractor (FAR 46.202-2);

   b. Standard inspection requirements (FAR 46.202-3); and

   c. Higher-level contract quality requirements (FAR 46.202-4).

3. The FAR contains several different inspection clauses. In determining which clause to use, consider:

   a. The contract type (e.g., fixed-price, cost-reimbursement, time-and-materials, and labor-hour); and

   b. The nature of the item procured (e.g., supply, service, construction, transportation, or research and development).

c. Depending upon the specific clauses in the contract, the government has the right to inspect and test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. See, e.g., FAR 52.246-2 (supplies-fixed-price), -4 (services-fixed-price), -5 (services-cost-reimbursement), -6 (time-and-materials and labor-hour), -8 (R&D-cost-reimbursement), -9 (R&D), -10 (facilities), and -12 (construction).

C. Operation of the Inspection Clauses.

1. Inspection and testing must reasonably relate to the determination of whether performance is in compliance with contractual requirements.

2. Contractually specified inspections or tests are presumed reasonable unless they conflict with other contract requirements. General Time Corp., ASBCA No. 22306, 80-1 BCA ¶ 14,393.

3. If the contract specifies a test, the government may not require a higher level of performance than measured by the method specified. United Technologies Corp., Sikorsky Aircraft Div. v. United States, 27 Fed. Cl. 393 (1992).

4. If the contract specifies no particular tests, consider the following factors in selecting a test or inspection technique:

a. Consider the intended use of the product or service. A-Nam Cong Ty, ASBCA No. 14200, 70-1 BCA ¶ 8,106 (unreasonable to test coastal water barges on the high seas while fully loaded).

b. Measure compliance with contractual requirements, and inform the contractor of the standards it must meet. Service Eng'g Co., ASBCA No. 40275, 94-1 BCA ¶ 26,382 (board refused to impose a military standard on contract for ship repair, where contract simply required workmanship in accordance with "best commercial marine practice"); Tester Corp., ASBCA No. 21312, 78-2 BCA ¶ 13,373, mot. for recon. denied, 79-1 BCA ¶ 13,725.

c. Use standard industry tests, if available. DiCecco, Inc., ASBCA No. 11944, 69-2 BCA ¶ 7,821 (use of USDA mushroom standards upheld). But see Chelan Packing Co., ASBCA No. 14419, 72-1 BCA ¶ 9,290 (government inspector failed to apply industry standard properly).

d. The government must inspect and test correctly. Baifield Indus., Div. of A-T-O, Inc., ASBCA No. 13418, 77-1 BCA ¶ 12,308 (cartridge cases/rounds fired at excessive pressure).

XII. GOVERNMENT REMEDIES UNDER THE INSPECTION CLAUSE.

A. The inspection clauses give the government significant remedies.

2. The government's remedies under the inspection clauses operate in two phases. Initially, the government may demand correction of deficiencies. If this proves to be unsuccessful, the government may obtain corrective action from other sources.

3. Under the inspection clauses, the government's remedies depend upon when the contractor delivers nonconforming goods or services.

B. Defective Performance **BEFORE** the Required Delivery Date.

1. If the contractor delivers defective goods or services before the required delivery date, the government may:

a. Reject the tendered product or performance. Andrews, Large & Whidden, Inc. and Farmville Mfg. Corp., ASBCA No. 30060, 88-2 BCA ¶ 20,542 (government demand for replacement of non-conforming windows sustained); But see Centric/Jones Constr., IBCA No. 3139, 94-1 BCA ¶ 26,404 (government failed to prove that rejected work was noncompliant with specifications; contractor entitled to equitable adjustment for performing additional tests to secure government acceptance);

b. Require the contractor to correct the nonconforming goods or service, giving the contractor a reasonable opportunity to do so. Premiere Bldg. Servs., Inc., B-255858, Apr. 12, 1994, 94-1 CPD ¶ 252 (government may charge reinspection costs to contractor); or,

c. Accept the nonconforming goods or services at a reduced price. Federal Boiler Co., ASBCA No. 40314, 94-1 BCA ¶ 26,381 (change in cost of performance to the contractor, not the damages to the government, is the basis for adjustment); Blount Bros. Corp., ASBCA No. 29862, 88-2 BCA ¶ 20,644 (government entitled to a credit totalling the amount saved by contractor for using nonconforming concrete). See also Valley Asphalt Corp., ASBCA No. 17595, 74-2 BCA ¶ 10,680 (although runway built to wrong elevation, only nominal price reduction allowed because no loss in value to the government).

2. The government may not terminate the contract for default based on the tender of nonconforming goods or services before the required delivery date.

C. Defective Performance **ON** the Required Delivery Date.

1. If the contractor delivers nonconforming goods or services on the required delivery date, the government may:

a. Reject or require correction of the nonconforming goods or services;

b. Reduce the contract price and accept the nonconforming product; or

c. Terminate for default if performance is not in substantial compliance with the contract requirements. See FAR 52.249-6 to 52.249-10; Deskbook, Ch. 25. When the government terminates a contract for default, it acquires rights and remedies under the Termination Clause, including the right to reprocure supplies or services similar to those terminated and charge the contractor the additional costs. See FAR 52.249-8(b).

2. If the contractor has complied substantially with the requirements of the contract, the government must give the contractor notice and the opportunity to correct minor defects before terminating the contract for default. Radiation Tech., Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966).

D. Defective Performance **AFTER** the Required Delivery Date.

1. Generally, the government may terminate the contract for default.

2. If the contractor has complied substantially with the requirements of the contract, albeit after the required delivery date, the government should give the contractor notice of the defects and an opportunity to correct them. See Franklin E. Penny Co. v. United States, 524 F.2d 668 (Ct. Cl. 1975) (late nonconforming goods may substantially comply with contract requirements); Section IV, para. B.6, infra.

3. The government may accept nonconforming goods or services at a reduced price.

E. Remedies if the Contractor Fails to Correct Defective Performance. If the contractor fails to correct defective performance after receiving notice and a reasonable opportunity to correct the work, the government may:

1. Contract with a commercial source to correct or replace the defective goods or services (obtaining funding is often difficult and may make this remedy impracticable), George Bernadot Co., ASBCA No. 42943, 94-3 BCA ¶ 27,242; Zimcon Professionals, ASBCA Nos. 49346, 51123, 00-1 BCA ¶ 30,839 (Government may contract with a commercial source to correct or replace the defective goods or services and may charge cost of correction to original contractor);

2. Correct or replace the defective goods or services itself;

3. Accept the nonconforming goods or services at a reduced price, or;

4. Terminate the contract for default. FAR 52.246-4(f); Firma Tiefbau Meier, ASBCA No. 46951, 95-1 BCA ¶ 27,593.

XIII. THE RIGHT TO TERMINATE FOR CONVENIENCE.

A. Definition: "Termination for convenience" means the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest. FAR 2.101.

B. Inherent Authority.

1. The government has inherent authority to suspend contracts. United States v. Corliss Steam Engine Co., 91 U.S. 321 (1875).

2. A contractor can recover breach of contract damages, which include anticipatory (lost) profits, as a result of a termination based on inherent authority. United States v. Speed, 75 U.S. 77 (1868).

3. Statutory and Regulatory Authority.

a. Terminations for the government's convenience developed as a tool to avoid enormous procurements upon completion of a war effort. See Dent Act, 40 Stat. 1272 (1919); Contract Settlement Act of 1944, 58 Stat. 649.

b. Settlement of war related contracts led to the federal procurement policy that the parties to a federal contract must bilaterally agree that the government can terminate a contract for convenience.

c. Convenience termination clauses preclude the contractor from recovering anticipatory or lost profits when the government in good faith terminates the contract for its convenience.

C. Termination is for the convenience of the government. When a contractor is performing at a loss, termination may be beneficial to the contractor, but the government has no duty to the contractor to exercise the government's right to terminate for the contractor's benefit. Contact Int'l Corp., ASBCA No. 44636, 95-2 BCA ¶ 27,887; Rotair Indus., ASBCA No. 27571, 84-2 BCA ¶ 17,417.

D. Termination for Convenience Clauses. FAR 52.249-1 through 52.249-7.

1. The FAR provides various termination for convenience clauses. The proper clause for a specific contract is dependent upon the type and dollar amount of the contract. See FAR Subpart 49.5.

2. The clauses give the government a right to terminate a contract, in whole or in part, when in the government's interest.

3. The clauses also provide the contractor with a monetary remedy.

   a. The contractor is entitled to:

      (1) the contract price for completed supplies or services accepted by the government;

      (2) reasonable costs incurred in the performance of the work terminated, to include a fair and reasonable profit (unless the contractor would have sustained a loss on the contract if the entire contract had been completed); and

      (3) reasonable costs of settlement of the work terminated. See FAR 52.249-2(g).

   b. Exclusive of settlement costs, the contractor's recovery may not exceed the total contract price.

   c. The contractor cannot recover anticipated (lost) profits or consequential damages, which would be recoverable under common law breach of contract principles. FAR 49.202(a).

E. The "Christian Doctrine." A mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law. G.L. Christian & Assoc. v. United States, 312 F.2d 418 (Ct. Cl. 1963) (termination for convenience clause read into the contract by operation of law).

1. The Christian doctrine does not turn on whether clause was intentionally or inadvertently omitted, but on whether procurement policies are being avoided or evaded, deliberately or negligently, by lesser officials. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993) (Buy American Act (BAA) clause for construction contract read into contract after it had been stricken and erroneously replaced by the BAA supply clause).

2. The Christian doctrine applies only to mandatory clauses reflecting significant public procurement policies. Michael Grinberg, DOT BCA No. 1543, 87-1 BCA ¶ 19,573 (board refused to incorporate by operation of law a discretionary T4C clause).

3. The Christian doctrine does not apply when the contract includes an authorized deviation from the standard termination for convenience clause. Montana Refining Co., ASBCA No. 44250, 94-2 BCA ¶ 26,656 (ID/IQ contract with a stated minimum quantity included deviation in T4C clause that agency would not be liable for unordered quantities of fuel "unless otherwise stated in the contract").

4. When a contract lacks a termination clause, an agency can't limit termination settlement costs by arguing that the Short Form termination clause applies. Empres de Viacao Terceirense, ASBCA No. 49827, 00-1 BCA ¶ 30,796 (ASBCA noted that use of the Short Form clause was predicated on a contracting officer's determination and exercise of discretion, which was lacking in this case).

XIV. THE DECISION TO TERMINATE FOR CONVENIENCE.

A Regulatory Guidance.

1. The FAR clauses give the government the right to terminate a contract in whole or in part if the contracting officer determines that termination is in the government's interest. See John Massman Contracting Co. v. United States, 23 Cl. Ct. 24 (1991) (no duty to terminate when it would be in the contractor's best interest).

2. The FAR provides no guidance on factors that the contracting officer should consider when determining whether termination is "in the government's interest." FAR 49.101(b) and the convenience termination clauses merely provide that contracting officers shall terminate contracts only when it is in the government's interest to do so.

3. The right to terminate "comprehends termination in a host of variable and unspecified situations" and is not limited to situations where there is a "decrease in the need for the item purchased." John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).

4. A "cardinal change" in the government's requirements is not a prerequisite to a termination for convenience. T&M Distributors, Inc. v. United States, 185 F.3d 1279 (Fed. Cir. 1999).

5. The FAR does provide guidance concerning circumstances in which contracting officers normally **cannot or should not** use a convenience termination. For example, a negotiated no-cost settlement is appropriate instead of a termination for convenience or default when:

   a. The contractor will accept it;

   b. Government property was not furnished; and,

   c. There are no outstanding payments due to the contractor, debts due by the contractor to the government, or other contractor obligations. FAR 49.101(b).

6. The government normally should not terminate a contract, but should allow it to run to completion, when the price of the undelivered balance of the contract is less than $5,000. FAR 49.101(c).

7. In many cases, the contracting officer must obtain authorization before exercising his or her authority to terminate a contract for convenience. However, there is no requirement to give the contractor a hearing before the termination decision. Melvin R. Kessler, PSBCA No. 2820, 92-2 BCA ¶ 24,857.

8. Notice of termination. When terminating a contract for convenience, the contracting officer must provide notice to the contractor, the contract administration office, and any known assignee, guarantor, or surety of the contractor. Notice shall be made by certified mail or hand delivery. FAR 49.102.

9. Contractor duties after receipt of notice of termination. FAR 49.104. The contractor is required generally to:

   a. Stop work immediately and stop placing subcontracts;

   b. Terminate all subcontracts;

   c. Immediately advise the TCO of any special circumstances precluding work stoppage;

   d. Perform any continued portion of the contract and submit promptly any request for equitable adjustment to the price;

   e. Protect and preserve property in the contractor's possession;

   f. Notify TCO in writing concerning any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;

   g. Settle subcontract proposals;

   h. Promptly submit own termination settlement proposal; and

i. Dispose of termination inventory as directed or authorized by TCO.

10. Duties of TCO after notice of termination. FAR 49.105.

a. Direct action of prime contractor;

b. Examine contractor's settlement proposal and subcontractor proposals;

c. Promptly negotiate settlement agreement or settle by determination.

B. Standard of Review.

1. The courts and boards recognize the government's broad right to terminate a contract for convenience. It is not the province of the courts to decide de novo whether termination of the contract was the best course of action. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990).

2. The "Kalvar" test. To find that a termination for convenience in legal effect is a breach of contract, a contractor must prove bad faith or clear abuse of discretion. This is sometimes referred to as the "Kalvar" test. Salsbury Indus. v. United States, 905 F.2d 1518 (Fed. Cir. 1990); Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976); TLT Constr. Corp., ASBCA No. 40501, 93-3 BCA ¶ 25,978 (inept government actions do not constitute bad faith); Northrop Grumman Corp. v. United States, 46 Fed. Cl. 622 (2000).

a. Bad faith.

(1) Boards and courts presume that contracting officers act conscientiously in the discharge of their duties. Krygoski Construction Company, Inc. v. United States, 94 F.3d 1537 (Fed. Cir. 1996).

(2) To succeed on this theory, a contractor must show through "well nigh-irrefragable proof," tantamount to evidence of some specific intent to injure the contractor, that the contracting officer acted in bad faith. Kalvar Corp., Inc., v. United States, 543 F.2d 1298 (Ct. Cl. 1976). A recent example of bad faith is found in Bill Hubbard v. United States, 52 Fed. Cl. 192 (2002) (It was "clear to the court that the stated reasons for [moving the plaintiff's office location] were pretextual, and that the move was engineered in bad faith, without regard, indeed, with deliberate and bad faith disregard, for the legitimate business interests" of the plaintiff).

(3) Standard of Proof: To overcome the presumption that the government acts in good faith, requires "clear and convincing" evidence. Am-Pro Protective Services, Inc. v. United States, 281 F.3d 1234 (Fed. Cir. 2002) (Protestor's "belated assertions, with no corroborating evidence, therefore fall short of the clear and convincing or highly probable (formerly described as well-nigh irrefragable) threshold.").

b. Abuse of discretion.

(1) A contracting officer's decision to terminate for convenience cannot be arbitrary or capricious.

(2) The Court of Claims (predecessor to the Court of Appeals for the Federal Circuit) cited four factors to apply in determining whether a contracting officer's discretionary decision is arbitrary or capricious. Keco Indus. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). These factors are:

(a) Evidence of subjective bad faith on the part of the government official;

(b) Lack of a reasonable basis for the decision;

(c) The amount of discretion given to the government official; *i.e*., the greater the discretion granted, the more difficult it is to prove that the decision was arbitrary and capricious; and,

(d) A proven violation of an applicable statute or regulation [this factor alone may be enough to show that the conduct was arbitrary and capricious].

XV. CONVENIENCE TERMINATION SETTLEMENTS.

A. Procedures. FAR Part 49.

1. After termination for convenience, the parties must:

a. Stop the work.

b. Dispose of termination inventory.

a. Adjust the contract price.

2. Timing of the termination settlement proposal.

a. The contractor must submit its termination proposal within **one year** of notice of the termination for convenience. FAR 49.206-1; 52.249-2(j); The Swanson Group, ASBCA No. 52109, 01-1 BCA ¶ 31,164; Do-Well Mach. Shop, Inc. v. United States, 870 F.2d 637 (Fed. Cir. 1989) ("we cannot hold that Congress wanted to prevent parties from agreeing to terms that would further expedite the claim resolution process."); Industrial Data Link Corp., ASBCA No. 49348, 98-1 BCA ¶ 29,634, aff'd 194 F.3d 1337 (Fed. Cir., 1999); Harris Corp., ASBCA No. 37940, 90-3 BCA ¶ 23,257.

b. Timely submittal is defined as mailing the proposal within one year after receipt of the termination notice. Voices R Us, Inc., ASBCA No. 51565, 99-1 BCA ¶ 30,213 (denying Government's summary judgment motion for failure to provide evidence that fax notice of termination was sent to and received by contractor); Jo-Bar Mfg. Corp., ASBCA No. 39572, 93-2 BCA ¶ 25,756 (finding timely mailing despite lack of government receipt).

c. If a contractor fails to submit its termination settlement proposal within the required time period, or any extension granted by the contracting officer, the contracting officer may then unilaterally determine the amount due the contractor. FAR 49.109-7.

d. Refusal to grant an extension of time to submit a settlement proposal is not a decision that can be appealed. Cedar Constr., ASBCA No. 42178, 92-2 BCA ¶ 24,896.

B. Amount of Settlement.

1. Methods of settlement. FAR 49.103.

a. Bilateral negotiations between the contractor and the government.

b. Unilateral determination of the government. FAR 49.109-7. This method is appropriate only when the contractor fails to submit a proposal or a settlement cannot be reached by agreement.

2. Bases of settlement. The two bases for settlement proposals are the inventory basis (the preferred method), and the total cost basis. FAR 49.206-2.

a. Inventory basis. Settlement proposal must itemize separately:

(1) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;

(2) Charges such as engineering costs, initial costs, and general administrative costs;

(3) Costs of settlements with subcontractors;

(4) Settlement expenses; and

(5) Other proper charges;

(6) An allowance for profit or adjustment for loss must be made to complete the gross settlement proposal.

XVI. CONTRACT TERMINATIONS FOR DEFAULT, INTRODUCTION

A. General. Courts and boards hold the government to a high standard when erminating a contract for default because of the adverse impact such an action has on a contractor. Indeed, judges often describe terminations for default as a "contractual death sentence." Unfortunately, government officials frequently fail to follow prescribed procedures, rendering default terminations subject to reversal on appeal. Prior to issuing a default termination notice, contracting officers must have a valid basis for the termination, must issue proper notices, must account for the contractor's excusable delay, must act with due diligence, and must make a reasonable determination while exercising independent judgment. Attorneys play a critical role in this process, ensuring that all legal requirements are met and the termination decision receives the care and attention it deserves.

B. Definition of Default. A contractor's unexcused present or prospective failure to perform in accordance with the contract's terms, specifications, or delivery schedule constitutes contractual default under government contracts. See FAR 49.401.

C. Review of Default Terminations by the Courts and Boards.

1. "[A] termination for default is a drastic sanction that should be imposed upon a contractor only for good cause and in the presence of solid evidence." Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992).

2. Burden of Proof.

   a. It is the government's burden to prove, by a preponderance of the evidence, that the termination for default was proper. Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987); Walsky Constr. Co., ASBCA No. 41541, 94-1 BCA ¶ 26,264.

   b. A contractor's technical default is not determinative of its propriety. The Government must exercise its discretion reasonably to terminate a contract for default. Darwin Constr. Co. v. United States, 811 F.2d 593 (Fed. Cir. 1987).

   c. Once the government has met its burden of demonstrating the appropriateness of the default, the contractor has the burden of proof that its failure to perform was the result of causes beyond its control and without fault on its part. International Elec. Corp. v. United States, 646 F.2d 496 (Ct. Cl. 1981); Composite Int'l, Inc., ASBCA No. 43359, 93-2 BCA ¶ 25,747.

XVII. THE RIGHT TO TERMINATE FOR DEFAULT.

A. Contractual Rights.

1. The FAR contains various Default clauses for use in government contracts that identify the conditions that permit the government to terminate a contract for default.

2. The clauses contain different bases for termination and different notice requirements. For example, the Fixed-Price Supply and Service clause (FAR 52.249-8) is different from the Fixed-Price Construction clause (FAR 52.249-10).

B. Common-Law Doctrine.

1. The standard FAR Default clauses provide: "The rights and remedies of the government in this clause are in addition to any other rights and remedies provided by law or under this contract." See FAR 52.249-8 and FAR 52.249-10.

2. Courts commonly cite the above-quoted provision to support the government's termination of a contract for default based on common-law doctrines such as anticipatory repudiation. Cascade Pac. Int'l v. United States, 773 F.2d 287 (Fed. Cir. 1985).

XVIII. GROUNDS FOR DEFAULT TERMINATION.

A. Failure to Deliver or Perform on Time.

1. This ground is commonly referred to as an "(a)(1)(i)" termination. FAR 52.249-8(a)(1)(i); 52.249-10(a).

2. Generally, time is of the essence in all government contracts containing fixed dates for delivery or performance. Devito v. United States, 413 F.2d 1147 (Ct. Cl. 1969); Kit Pack Co., ASBCA No. 33135, 89-3 BCA ¶ 22,151. Upon non-delivery of a contract requirement, the government has an immediate right to terminate the contract. Vought Aircraft Company, ASBCA No. 38,092, 96-2 BCA ¶ 28,321.

(a) When a contract does not specify delivery dates (or those dates have been waived) actual delivery could constitute the "delivery date" for purposes of the T4D clause. Aerometals, Inc., ASBCA No. 53688, 2003 ASBCA LEXIS 74 (June 25, 2003).

3. Compliance with specifications.

(a) The government is entitled to strict compliance with its specifications. Mega Constr. Co. v. United States, 25 Cl. Ct. 735 (1992); Kurz-Kasch, Inc., ASBCA No. 32486, 88-3 BCA ¶ 21,053.

(b) However, courts and boards recognize the common-law principles of **substantial compliance** (supply) and **substantial completion** (construction) to protect the contractor where timely performance departs in minor respects from that required by the contract. If the contractor substantially complies with the contract, the government must give the contractor additional time to correct the defects prior to terminating for default. Radiation Technology, Inc. v. United States, 366 F.2d 1003 (Ct. Cl. 1966); FD Constr. Co., ASBCA No. 41441, 91-2 BCA ¶ 23,983 (contractor not protected under doctrine of substantial completion because it abandoned the work and refused to complete punchlist and administrative items).

B. Failure to Make Progress so as to Endanger Performance.

1. Supply and Service. The Default clauses for fixed-price supply and service contracts and cost-reimbursement contracts provide for termination when the contractor fails to make progress so as to endanger performance. This is commonly referred to as an "(a)(1)(ii)" termination. FAR 52.249-8(a)(1)(ii); FAR 52.249-6(a).

2. Construction. The Default clause for fixed-price construction contracts provides for termination when the contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in the contract. FAR 52.249-10(a).

3. Proof.

a. The government is not required to show that it was impossible for the contractor to complete performance. California Dredging Co., ENG BCA No. 5532, 92-1 BCA ¶ 24,475.

b. Rather, the contracting officer must have a **reasonable belief** that there is no likelihood that the contractor can perform the entire contract effort within the time remaining for contract performance. (this clause of the default provision required the contracting officer to have a "reasonable belief . . . that there was no likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance."). Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) (upholding T4D conversion where government did not determine whether contractor could complete work within the required time, or determine how long it would take a follow-on contractor to do the work); Pipe Tech, Inc., ENG BCA No. 5959, 94-2 BCA ¶ 26,649 (termination improper where 92% of contract performance time remained and reprocurement contractor fully performed within the time allowed in defaulted contract).

c. Prior to termination, the contracting officer should analyze progress problems against a specified completion date, adjusted to account for any government-caused delays. Technocratica, ASBCA No. 44134, 94-2 BCA ¶ 26,606 (termination for "poor progress" improper).

d. Factors to consider include, but are not limited to: "a comparison of the percentage of work completed and" the time remaining before completion is due; "the contractor's failure to meet progress milestones"; "problems with subcontractors and suppliers"; "the contractor's financial situation"; and, the contractor's past performance. McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1010 (Fed. Cir. 2003)

C. Failure to Perform Any Other Provision of the Contract.

1. Supply and Service. The default clause in fixed-price supply and service contracts specifically provides this ground for termination. It is commonly referred to as an "(a)(1)(iii)" termination. FAR 52.249-8(a)(1)(iii).

2. Construction. This basis does not exist under the construction clauses. See FAR 52.249-10. However, the courts and boards may sustain default terminations of construction contracts based on inability to perform and/or prosecute the work with the diligence required to insure timely completion. Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (failure to maintain the proper insurance coverage).

3. Courts and boards will not sustain a default termination unless that "other provision" of the contract is a "material" or "significant" requirement. Precision Prods., ASBCA No. 25280, 82-2 BCA ¶ 15,981 (noncompliance with first article manufacture requirements not deemed material under facts).

4. Examples.

a. Failure to employ drivers with valid licenses. Maywood Cab Service, Inc., VACAB No. 1210, 77-2 BCA ¶ 12,751.

b. Failure to obtain liability insurance. UMM, Inc., ENG BCA No. 5330, 87-2 BCA ¶ 19,893 (mowing services contract).

c. Violation of the Buy American Act. HR Machinists Co., ASBCA No. 38440, 91-1 BCA ¶ 23,373.

d. Failure to comply with statement of work. 4-D and Chizoma, Inc., ASBCA Nos. 49550, 49598, 00-1 BCA ¶ 30,782 (failure to properly videotape sewer line).

e. Failure to retain records under Payrolls and Basic Records Clause justified default under the Davis-Bacon Act. Kirk Bros. Mech. Contractors, Inc. v. Kelso, 16 F.3d 1173 (Fed. Cir. 1994)

XIX. DEFAULT TERMINATION NOTICE REQUIREMENTS.

A. Cure Notice.

1. For fixed-price supply or service contracts, research and development contracts, and cost-reimbursement contracts, the government must notify the contractor, in writing, of its failure to make progress ((a)(1)(ii)) or its failure to perform any other provision of the contract ((a)(1)(iii)) and give the contractor 10 days in which to cure such failure before it may terminate the contract. FAR 52.249-6; FAR 52.249-8; FAR 52.249-9. See FAR 49.607(a).

   a. A proper cure notice must inform the contractor in writing:

      (1) That the government intends to terminate the contract for default;

      (2) Of the reasons for the termination; and

      (3) That the contractor has a right to cure the specified deficiencies within the cure period (10 days).

   b. To support a default decision, the cure notice must clearly identify the nature and extent of the performance failure. Lanzen Fabricating, Inc, ASBCA No. 40328, 93-3 BCA ¶ 26,079 (show cause notice did not serve as cure notice for purposes of (a)(1)(ii) termination because it didn't specify failures to be cured); Insul-Glass, Inc., GSBCA No. 8223, 89-1 BCA ¶ 21,361(notice directed contractor to provide acceptable drawings without specifying what the contractor had to do to make the drawings acceptable).

   c. The government must give the contractor a minimum of ten days to cure the deficiency. Red Sea Trading Assoc., ASBCA No. 36360, 91-1 BCA ¶ 23,567 (the ten day period need not be specifically stated in the notice if a minimum of ten days was actually afforded the contractor).

2. The government may terminate cost-reimbursement contracts for default if the contractor defaults in performing the contract and fails to cure the defect in performance within ten days of receiving a proper cure notice from the contracting officer. FAR 52.249-6(a)(2).

3. A cure notice is **NOT** required before:

a. Terminating for failure to timely deliver goods. Delta Indus., DOT BCA No. 2602, 94-1 BCA ¶ 26,318 (government rejected desks that did not meet contract specifications).

b. Terminating pursuant to an independent clause of the contract not requiring notice. See "K" Servs., ASBCA No. 41791, 92-1 BCA ¶ 24,568 (default under FAR 52.209-5 for false certification regarding debarment status of contractor's principal).

c. Terminating based on the contractor's anticipatory repudiation of the contract. Beeston, Inc., ASBCA No. 38969, 91-3 BCA ¶ 24,241; Scott Aviation, ASBCA No. 40776, 91-3 BCA ¶ 24,123.

d. Terminating construction contracts. FAR 52.249-10. However, the government frequently provides the contractor a cure notice prior to terminating these contracts. See Hillebrand Constr. of the Midwest, Inc., ASBCA No. 45853, 95-1 BCA ¶ 27,464 (failure to provide submittals); Engineering Technology Consultants, S.A., ASBCA No. 43454, 94-1 BCA ¶ 26,586 (concerning contractor's failure to provide proof of insurance).

B. Show Cause Notice. If a termination for default appears appropriate, the government **should, if practicable**, notify the contractor in writing of the possibility of the termination. FAR 49.402-3(e)(1). This notice is referred to as a "show cause" notice. FAR 49.607.

1. The show cause notice should:

a. Call the contractor's attention to its contractual liabilities if the contract is terminated for default.

b. Request the contractor to show cause why the contract should not be terminated for default.

a. State that the failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists.

2. The default clauses do not require the use of a show cause notice. See FAR 52.249-8 (Supply and Service); FAR 52.249-9 (Research and Development); FAR 52.249-10 (Construction); Alberts Assocs., ASBCA No. 45329, 95-1 BCA ¶ 27,480.

a. The contracting officer is not required to include every subsequently advanced reason for the termination in the show cause notice because the government is under no obligation to issue the notice. Sach Sinha and Associates, Inc., ASBCA No. 46916, 96-2 BCA ¶ 28,346.

b. However, the courts and boards may require a "show cause" notice if its use was practicable. Udis v. United States, 7 Cl. Ct. 379 (1985); Enginetics Corp., ASBCA No. 40834, 92-2 BCA ¶ 24,965 (denying government's motion for summary judgment while noting government's failure to issue show cause notice).

c. If the government issues a show cause notice, it need not give the contractor ten days to respond. Nisei Constr. Co., Inc., ASBCA Nos. 51464, 51466, 51646, 99-2 BCA ¶ 30,448 (six days was sufficient in construction default case).

XX. CONTRACT DISPUTES ACT CLAIMS.

A. The Disputes Process.

1. The CDA establishes procedures and requirements for asserting and resolving claims subject to the Act.

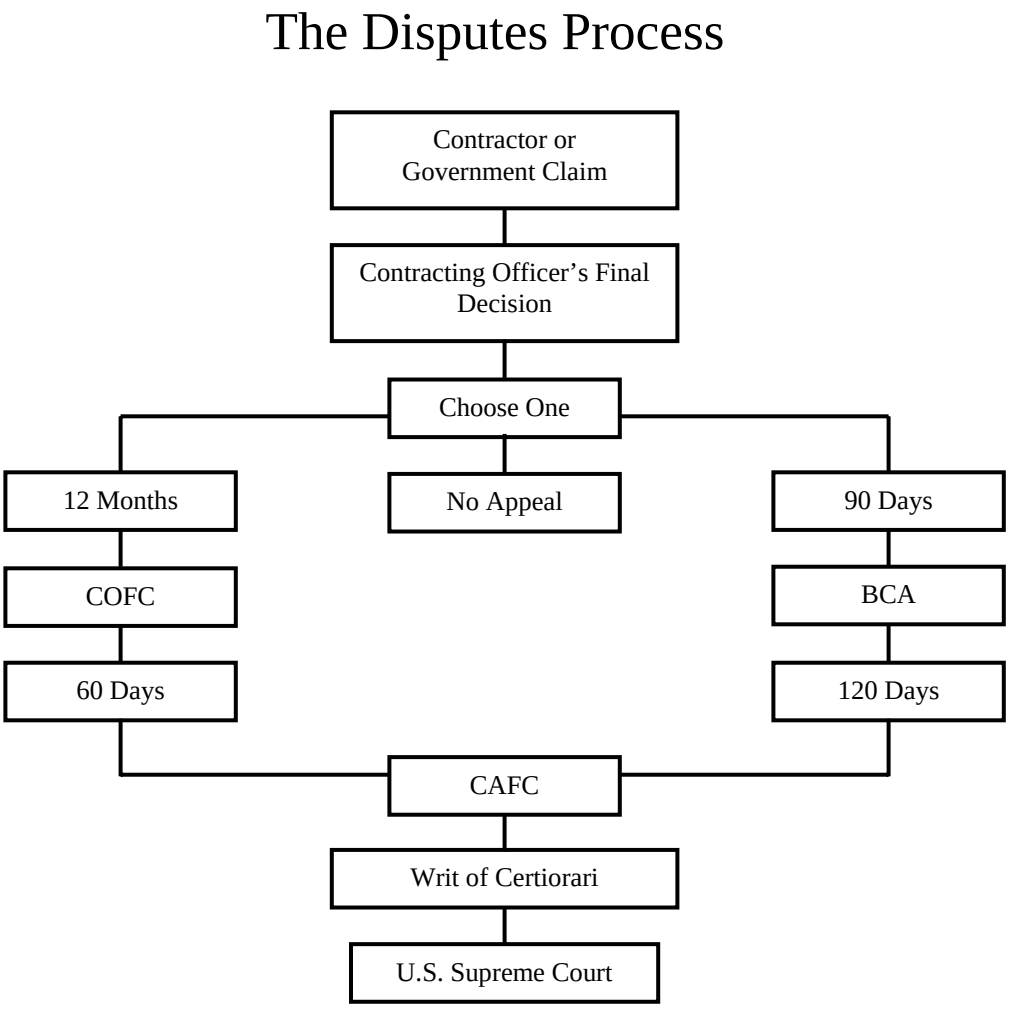
2. Distinguishing bid protests from disputes.

a. In bid protests, disappointed bidders or offerors seek relief from actions that occur before contract award. See generally FAR Subpart 33.1.

b. In contract disputes, contractors seek relief from actions and events that occur after contract award. See generally FAR Subpart 33.2.

c. The Boards of Contract Appeals lack jurisdiction over bid protest actions. See United States v. John C. Grimberg, Inc., 702 F.2d 1362 (Fed. Cir. 1983) (stating that "the [CDA] deals with contractors, not with disappointed bidders); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318 (dismissing an appeal based on the contracting officer's written refusal to award the contractor a research contract); RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658 (dismissing an appeal for lost profits arising from the contracting officer's failure to award the contractor a grounds maintenance services contract).

3. The disputes process flowchart.



4. The Election Doctrine. The CDA provides alternative forums for challenging a contracting officer's final decision. Once a contractor files its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum. The "election doctrine," however, does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. 41 U.S.C. §§ 606, 609(a)(1). See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

B. Proper Claimants.

1. Only the parties to the contract (i.e., the prime contractor and the government) may normally submit a claim. 41 U.S.C. § 605(a).

2. Subcontractors.

a. A subcontractor can't file a claim directly with the contracting officer. United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983) (dismissing subcontractor claim); see also Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA ¶ 28,493 (holding that the subcontractor's direct communication with the government did not establish privity); Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347 (rejecting the subcontractor's assertion that the Suits in Admiralty Act gave it the right to appeal directly); cf. Department of the Army v. Blue Fox, 119 S. Ct. 687 (1999) (holding that a subcontractor may not sue the government directly by asserting an equitable lien on funds held by the government). But see Choe-Kelly, ASBCA No. 43481, 92-2 BCA ¶ 24,910 (holding that the board had jurisdiction to consider the subcontractor's unsponsored claim alleging an implied-in-fact contract).

b. A prime contractor, however, can sponsor claims (also called "pass-through claims") on behalf of its subcontractors. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (appeal dismissed where prime stated it did not wish to pursue the appeal).

3. Dissolved/Suspended Corporations. A corporate contractor must possess valid corporate status, as determined by applicable state law, to assert a CDA appeal. See Micro Tool Eng'g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under New York law). But cf. Fre'nce Mfg. Co., ASBCA No. 46233, 95-2 BCA ¶ 27,802 (allowing a "resurrected" contractor to prosecute the appeal). Allied Prod. Management, Inc., and Richard E. Rowan, J.V., DOT CAB No. 2466, 92-1 BCA ¶ 24,585 (allowing a contractor to appeal despite its suspended corporate status).

C. Definition of a Claim.

1. Contract Disputes Act. The CDA does not define the term "claim." As a result, courts and boards look to the FAR for a definition. See Essex Electro Eng'rs, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) (holding that the executive branch has authority to issue regulations implementing the CDA, to include defining the term "claim," and that the FAR definition is consistent with the CDA).

2. The FAR defines a "claim" as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract." FAR 33.201; FAR 52.233-1. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a valid CDA claim. FAR 33.201; 52.233-1. A contractor may convert such a submission into a valid CDA claim if:

a. The contractor complies with the submission and certification requirements of the Disputes clause; and

b. The contracting officer:

c. Disputes the submission as to either liability or amount; or

d. Fails to act in a reasonable time. FAR 33.201; FAR 52.233-1. See S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957 (contracting officer's failure to respond for 6 months to contractor's "relatively simple" engineering change proposal (ECP) and REA was unreasonable).

D. Contracting Officer's Final Decision

1. General. The contracting officer must issue a written final decision on all claims. 51 U.S.C. § 605(a); FAR 33.206; FAR 33.211(a). See Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. But cf. McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700 (dismissing the contractor's appeal from a government claim for noncompliance with CAS because the procuring contracting officer issued the final decision instead of the cognizant administrative contracting officer as required by the FAR and DFARS).

2. Time Limits. A contracting officer must issue a final decision on a contractor's claim within certain statutory time limits. 41 U.S.C. § 605(c); FAR 33.211.

a. Claims of $100,000 or less. The contracting officer must issue a final decision within 60 days.

b. Certified Claims Exceeding $100,000. The contracting officer must take one of the following actions within 60 days:

(1). Issue a final decision; or

(2). Notify the contractor of a firm date by which the contracting officer will issue a final decision. See Boeing Co. v. United States, 26 Cl. Ct. 257 (1992); Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470 (concluding that the contracting officer failed to provide a firm date where the contracting officer made the timely issuance of a final decision contingent on the contractor's cooperation in providing additional information); Inter-Con Security Sys., Inc., ASBCA No. 45749, 93-3 BCA ¶ 26,062 (concluding that the contracting officer failed to provide a firm date where the contracting officer merely promised to render a final decision within 60 days of receiving the audit).

XXII. CONTRACT APPEALS PROCESS.

A. Appeals to the Armed Services Board of Contract Appeals (ASBCA).

1. The Right to Appeal. 41 U.S.C. § 606. A contractor may appeal a contracting officer's final decision to an agency BCA.

2. The ASBCA judges specialize in contract disputes and come from both the government and private sectors. Each judge has at least five years of experience working in the field of government contract law.

3. Jurisdiction. 41 U.S.C. § 607(d). The ASBCA has jurisdiction to decide appeals regarding contracts made by:

a. The Department of Defense; or

b. An agency that has designated the ASBCA to decide the appeal.

4. Standard of Review. The ASBCA will review the appeal de novo. See 41 U.S.C. § 605(a) (indicating that the contracting officer's specific findings of fact are not binding in any subsequently proceedings); see also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054 (final decision retains no presumptive evidentiary weight nor is it binding on the Board).

B. Actions Before the Court of Federal Claims.

1. The right to file suit. Subsequent to receipt of a contracting officer's final decision, a contractor may bring an action directly on the claim in the COFC.
41 U.S.C. § 609(a)(1).

2. Jurisdiction.

a. The Tucker Act. 28 U.S.C. § 1491(a)(1). The COFC has jurisdiction to decide claims against the United States based on:

(1). The Constitution;

(2). An act of Congress;

(3). An executive regulation; or

(4). An express or implied-in-fact contract.

b. The Contract Disputes Act (CDA) of 1978. 41 U.S.C. § 609. The Court has jurisdiction to decide appeals from contracting officers' final decisions.

3. Standard of Review. 41 U.S.C. § 609(a)(3). The COFC will review the case de novo. The COFC will not presume that the contracting officer's findings of fact and conclusions of law are valid. Instead, the COFC will treat the contracting officer's final decision as one more piece of documentary evidence and weigh it with all of the other evidence in the record. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (overruling previous case law that a contracting officer's final decision constitutes a "strong presumption or an evidentiary admission" of the government's liability).

C. Appeals to the Court of Appeals for the Federal Circuit (CAFC)

1. National Jurisdiction.

a. The Federal Circuit has national jurisdiction. Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).

b. The Federal Circuit also exclusive jurisdiction over appeals from an agency BCA and the COFC pursuant to section 8(g)(1) of the CDA.
28 U.S.C. § 1295(a)(3) and (10).

2. Standard of Review. 41 U.S.C. § 609(b).

a. Jurisdiction. The court views jurisdictional challenges as "pure issues of law," which it reviews de novo. See Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992).

b. Findings of Fact. Findings of fact are final and conclusive unless they are fraudulent, arbitrary, capricious, made in bad faith, or not supported by substantial evidence. 49 U.S.C. § 609(b). See United States v. General Elec. Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984) (holding that the court will affirm a board's decision if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"); Tecom, Inc. v. United States, 732 F.2d 935, 938 n.4 (Fed. Cir. 1995) (finding that the trier of fact's credibility determinations are virtually unreviewable).

D. Supreme Court Review. The U.S. Supreme Court reviews decisions of the Federal Circuit by writ of certiorari.

XXIII. CONCLUSION.